No. 278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, Petitioner,

vs.

JOSEPH T. BUDD, JR., et al., Respondents

BRIEF, AMICI CURIAE, IN SUPPORT OF RESPONDENTS, of

National Grange,
National Council of Farmer Cooperatives,
National Milk Producers Federation,
United Fresh Fruit and Vegetable Association,
National Cotton Council of America,
National Cotton Ginners Association, and
National Cotton Compress and Cotton Warehouse Association.

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Written consent of all parties to the filing of this brief, amici curiae, has been obtained and filed with the clerk as provided in Rule 27.9(a) of the Court.

Introduction—Interest of Amici Curiae

The National Grange is a national, voluntary, non-profit, general farm organization. Organized in 1867, it is the oldest of the national farm organizations. Its organization includes subsidiary granges in 39 states. Its membership includes 900,000 individual farmers. Its members produce practically every agricultural and horticultural commodity produced in the United States.

National Council of Farmer Cooperatives is an incorporated national, voluntary, non-profit farm organization whose direct members are 121 farmers' marketing and purchasing business associations, and state organizations of such associations. Its membership embraces some 5,000 local associations, and approximately 3,000,000 individual farmers located in all 48 states and Puerto Rico. These farmers produce, and the business associations represented in the Council's membership market, and in many cases store, process and otherwise prepare and service for market, practically every major type of agricultural commodity produced on the farms of America.

National Milk Producers Federation is a national, voluntary, non-profit association representing through its members and sub-members between 600 and 700 dairy farmer cooperatives embracing a membership of approximately 500,000 individual dairy farmers located in every state of the Union except Nevada. All such dairy farmer members produce milk, and in addition to milk, through those dairy farmer cooperatives, produce and market cream, butter, cheese and practically every other dairy product produced and marketed in the United States.

United Fresh Fruit and Vegetable Association is a national, voluntary, non-profit organization composed of and serving all branches of the fresh fruit and vegetable industry. Its membership includes some 2,800 producers, handlers, packagers, wholesalers and shippers distributed throughout the United States.

National Cotton Council of America is a national, voluntary, non-profit organization whose membership embraces every segment of the raw cotton industry in all of the cotton-growing states, including cotton farmers, cotton ginners, cotton warehouse and compress-warehouse oper-

ators, cotton-seed processors, cotton merchants and cotton spinners.

National Cotton Ginners Association is a national, voluntary, non-profit association composed of the owners and operators of cotton ginning establishments located throughout the cotton-growing states of the United States, —with the exception of ginners in Arkansas and Missouri which currently are not affiliated with the national association.

National Cotton Compress and Cotton Warehouse Association is a national, voluntary, non-profit association composed of the owners and operators of public cotton warehouse and cotton compress-warehouse establishments located throughout the 14 major cotton-growing states.

Ignoring possible occasional duplications of membership, the above named amici curiae speak for substantially more than four and one-half million American farmers who are directly and personally engaged in agricultural and horticultural production. Their aggregate memberships also include the owners and operators of many thousands of establishments in the United States, in which farmers, horticulturists, farmer cooperatives, or independent entrepreneur bailees for hire are engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, and canning of agricultural and horticultural commodities for market, and in making cheese, butter and other dairy products, —that is to say all of the operations on agricultural and horticultural commodities which are subject to exemption from the wage and hour provisions of the Fair Labor Standards Act under the exemption contained in Section 13(a)(10) thereof, —to the extent that such operations are performed within the area of production (as defined by the Administrator).

Unless the Court's decision is specifically limited to pre-

vent that result, any determination of the issue relating to the validity of the Administrative definition of the "area of production" of agricultural and horticultural commodities (directly or indirectly) will have a serious effect upon the majority if not all of the members of all parties to this brief (except the cotton-seed processor, cotton merchant and cotton spinner members of National Cotton Council of America and possibly some shipper members of United Fresh Fruit and Vegetable Association); —and, similarly, any determination of the issue relating to application of the Section 13(a)(6) exemption of agricultural employment to the packing house operations of respondents May and King Edward may seriously affect the interest of many of the farmers embraced within the memberships of National Grange, National Council of Farmer Cooperatives, National Milk Producers Federation, and United Fresh Fruit and Vegetable Association.

In this brief, references to the record will be made by the letters "RK" (Record, King Edward Case), "RM" (Record, May Case), and "RB" (Record, Budd Case).

The duty and authority to define the area of production of the various agricultural and horticultural commodities imposed and conferred by Congress upon the Administrator in Section 13(a)(10) of the Fair Labor Standards Act was transferred to the Secretary of Labor (petitioner) by 1950 Reorganization Plan Number 6, 15 F. R. 3174, 64 Stat. 1263, set out in the note under 5 U. S. C. 611. Therefore, the designations "Administrator," "petitioner," and "Secretary of Labor" are used interchangeably herein.

For convenient reference, the provisions of Sec. 3(f), Sec. 13(a)(6) and Sec. 13(a)(10) of the Act are reproduced in Appendix B; and the text of the Administrator's definition of the area of production is reproduced in Appendix C hereto.

The Issues Involved and Their Importance Throughout the Nation

As between the parties hereto, this cause presents two questions which may be narrowly stated within the limits of the case at bar as follows:

1: With respect to the complete exemption from the minimum wage and overtime requirements of the Act contained in Section 13(a)(10) thereof for "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, . . . drying, (or) preparing in their raw or natural state, . . . of agricultural . . . commodities for market"; —and with respect to the purported definition of the area of production of all agricultural and horticultural commodities promulgated December 25, 1946 (29 C. F. R. 536.2): Is petitioner's definitive regulation rendered invalid because it provides that no individual engaged in performing the named operations will be considered as employed within the area of production of the commodity involved if he is so employed in or near a place of 2500 or greater population?

2: Does the complete exemption from the minimum wage and overtime requirements of the Act granted by Section 13(a)(6) thereof to any employee employed in "agriculture" (defined in Section 3(f) thereof to include "any practices . . . performed by a farmer . . . as an incident to or in conjunction with . . . farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.") extend to the piling, storing, drying, handling, and packing for market of U. S. Type 62 shade-grown tobacco by May and King Edward (the farmer-producers of such tobacco)?

The Court of Appeals has answered both questions in the affirmative (221 F. (2d) 406, 410-411).

3. A third question involved (which the Court of Appeals also decided in the affirmative) is whether respondents' packing house operations (the storing, piling, drying, packing, and otherwise handling for market of U. S. Type 62 tobacco) are included among the operations enumerated in Section 13(a)(10).

The importance and effects of this Court's determination of those questions upon review will extend (far beyond the production, handling, storing, piling, drying, and packing for market of U. S. Type 62 shade-grown tobacco in the vicinity of Quincy, Florida) to the production and essential servicing for market of virtually every agricultural and horticultural commodity, and virtually every farmer and horticulturist, in the United States. The force of impact of such determination upon United States agriculture and horticulture, and the essential servicing of agricultural and horticultural commodities for market, will be tremendously increased by the increase of the minimum wage provided in the Act from 75c to $1.00 per hour effective March 1, 1956 (P. L. 381, 84th Congress, 1st Session; 29 U. S. C. 206 (a)(1)).

ARGUMENT

I-A: The Administrator's Definition of the Area of Production is Ultra Vires, and therefore Invalid and Void

As more fully developed in Part II hereof, the Congress, in enacting the Act, evidenced a clear intent to protect and exempt the farmer and the horticulturist from any impact of the minimum wage and overtime requirements, not only with respect to actual agricultural production, but also with respect to the services necessary or incidental to the marketing of their crops.

Section 13(a)(6) of the Act provides such exemption for agricultural production, broadly defined to include all operations performed *either* by a farmer *or* on a farm as an incident to *or* in conjunction with agricultural production. By Section 13(a)(10), that exemption was extended to a comprehensive series of specified operations which are necessary to the marketing of farm and orchard products, —regardless of where or by whom such operations are conducted, so long as they are conducted within an area of agricultural production of the commodity or commodities involved. As an afterthought, it was inferentially provided in the conference report, and enacted without explanation or discussion, that the Administrator should, for the purposes of the exemption, define the area of production of each of the various agricultural and horticultural commodities. There was no suggestion, or reason to suspect, that the Administrator would do otherwise than simply outline the geographic boundaries of the areas within which various farm and orchard products are grown, or that the Administrator would not perform this function as an impartial agent of Congress and carry out its intention with respect to this exemption.

The respective Administrators, however, have proved to be—not impartial administrators, conscientiously undertaking to carry out the will of Congress—but ardent partisans and advocates of extension (both by legislation and by administrative fiat) of the minimum wage and overtime requirements to every possible individual.

Successive administrators have repeatedly urged Congress to repeal this exemption in its entirety (Annual Reports of the Administrator and of the Wage & Hour Division to Congress, 1939, 1941, 1942-1948, 1950 and 1951). The successive administrators proceeded meanwhile to issue successive regulations (published in Title 29, Chapter V, Part 536.2, Code of Federal Regulations), purporting to define the area of production of *all* agricultural and horticultural commodities. They did so with *combinations* of arbitrary and unrealistic criteria designed to restrict application of the exemption to the fewest possible workers. Thus the area of production of agricultural and horticultural commodities (generally, not separately) has successively been defined by the Administrator by use of criteria having no rational or necessary relation to the geographic boundaries of the areas of agricultural production of the respective farm and orchard products. This has been done (a) in terms of the distance which commodities move to reach the plants at which the named operations are conducted, (b) in terms of the number of persons engaged in the named operations, (c) in terms of the populations of places where the operations are conducted, and (d) in terms of the populations of places from which farm and orchard products are transported to such establishments. The current definition combines such a distance test with a population test applied both to plant location and to the points from which commodities are received for servicing. In the instance case the distance test is not directly in issue because respondents' operations comply with its terms.

To approve the population test of the Administrator's definition, which is directly in issue, would impute foolishness or futility to a clear, conscious and deliberate enactment of the Congress. As stated by Judge Pickett, dissenting in *Tobin v. Traders Compress Company* (199 F. (2d) 8, at p 11):

> "Generally the population of a city or town has no reasonable relation to the question of whether the plant is located within an area of production. The purpose of the Act was to grant an exemption which was thought to be helpful to the farmers and horticulturists, and it was not intended that the statutory exemption should be made ineffective or completely destroyed by regulation."

That conclusion was adopted and approved by the Court of Appeals for the Fifth Circuit in *Jenkins v. Durkin*, 208 F. (2d) 941 (1954) and in *Lovvorn v. Miller* 215 F. (2d) 601 (1954), as well as in the instant case.

The majority opinion in *Tobin v. Traders Compress Company* is the only instance in which any court has approved the administrator's current definition. As an essential basis for its decision, that majority opinion contains the finding (199 F. (2d) 8, 11) that:

> "To be sure, the population test does not effect discrimination between plants in the same geographical area, as did the number of employees test condemned in the Addison Case."

The quoted finding was completely without support in—and in fact contrary to—the record (*Traders Compress Company v. Tobin*, No. 441 in the Supreme Court of the U. S., October term, 1952, Petition for Rehearing of Order

Denying Petition for Writ of Certiorari, section 1, pp. 2-3, and evidence there cited).

That the population test of the Administrator's definition produces unlawful discrimination is clearly shown in the following sub-part (1-B):

I-B: The Administrator's Definition of the Area of Production Produces Widespread and Unlawful Discrimination Between Establishments within the only Geographic Area Defined or Prescribed In the Administrator's Regulation

Because neither the time available nor a reasonable length of this brief will permit exhaustive analysis of the data susceptible of judicial notice concerning *all* agricultural and horticultural commodities, this discussion will treat with cotton as illustrative of the situation existing with respect to the operations named in the Section 13(a)(10) exemption to apply to such commodities generally.

In "Area of Production: Cotton," December 1944, U. S. Department of Labor, Wage and Hour and Public Contracts Divisions, Economics Branch, it was indicated that:

1: Of 12,033 active cotton gins in the cotton-growing states, 1,362 gins or 11.4% were inside the corporate limits of places having 2,500 or greater population (1940 census) (p. 32, Table 23).

2: Of 1,262 non-compress cotton warehouses in cotton-growing states, 596 or 49.6% were located in places of 2,500 or greater population (1940 census) (p. 33, Table 24).

3: Of 320 cotton compress-warehouse plants in the cotton-growing states, 263 or 82.2% were located in places

of 2,500 or greater population (1940 census) (p. 35, Table 25).

Sources cited for these data are: Bureau of the Census, Population 1940, and unpublished data for distribution of cotton gins for the crop year 1943; and Cotton Fire & Marine Underwriters Classification of Cotton Compresses, Warehouses and Wharves for the season 1944-45.

The same sources (Bureau of the Census, Population 1950, and unpublished data for distribution of cotton gins for the crop year 1954, and Cotton Fire & Marine Underwriters Classification of Cotton Compresses, Warehouses and Wharves for the season 1955-56) show the current situation to be as follows:

1: Of 7,069 active cotton gins in cotton-growing states, more than 1,056 gins or 14.9% are located in places of 2,500 or greater population (1950 Census).

2: Of 1,252 non-compress cotton warehouses in cotton-growing states, 710 or 56.7% are located in places of 2,500 or greater population (1950 Census).

3: Of 299 cotton compress-warehouse plants in cotton-growing states, 253 or 84.6% are located in places of 2,500 or greater population (1950 Census).

Public cotton storage *capacity* (as reflected by the volumes of cotton on hand in public storage December 31, 1955) is so distributed in the cotton-growing states that the aggregate *storage capacity* of cotton warehouse plants and cotton compress-warehouse plants located at places having 2,500 population or more (1950 Census) is proportionately greater than the aggregate *number of such plants* indicated under 2 and 3, above. (Same current authorities, plus un-

published data of Bureau of the Census concerning distribution of cotton in public storage.)

In issuing his current definition of the area of production of agricultural and horticultural commodities, the Administrator admitted that his regulation would exclude from the defined area of production about 10% of all grain elevators because they were located in towns of 2,500 or greater population (1940 Census), —and that his definition for the same reason would exclude from the defined area of production about one-third of all fresh fruit and vegetable packing and canning, cheese manufacturing and poultry and egg assembling establishments. ("Findings of the Administrator, December 18, 1946, In the Matter of the Redefinition of the 'area of production' as used in Sections 7(c) and 13(a)(10) of the Fair Labor Standards Act of 1938," U. S. Department of Labor No. D-147(05112), sheet 8).

In the 1948 Annual Report of the Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, the Administrator estimated that, as of September 1947, under his (the present) definition of the area of production of agricultural and horticultural commodities, only 336,000 (28%) of the 1,200,000 employees engaged in the operations named in the Section 13(a)(10) exemption "may qualify for the exemption" (pp. 84, 124-125, Table 23).[1] Table 23 of that report indicates that the proportions of employees engaged in the various operations who "may" be exempt under Section 13(a)(10) ranged from a maximum of 70% of the persons employed in grain elevators and in the country buying of grain, to a low of 4% of the persons

[1]In the 1954 Annual Report of the Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, at p. 58, the Administrator states that "233,000 (19.4%) are (exempt because) engaged in handling or processing agricultural commodities in the area of production."

employed in the wholesaling of dairy products. The report gives no indication of the extent to which these results are attributable to the 2,500 population test, to the application of the mileage or distance test, or to the application of both tests combined.

At pp. 130-131 of that report, the Administrator evidenced complete lack of sympathy and respect for the Section 13(a)(10) exemption and other exemptions granted in the Act; and clearly indicated that the administrative policy with respect to Section 13(a)(10) and such other exemptions is, not to carry out the purposes of the exemptions, but rather to apply the general purposes of the Act to the fields covered by specific exemptions.

It is clear that the Congress had no intention whatever of authorizing or permitting the Administrator, by means of his definitive regulation, to discriminate between establishments located within the geographical area defined by such regulation (*Addison et al. v. Holly Hill Fruit Products, Inc.* 322 U. S. 607, 614; 64 S. Ct. 1215, 1220 (1944)).

In the 1954 Annual Report of the Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, at p. 36, the Administrator, in discussing the evidence received in his 1951 public hearings (conducted for the purpose of a possible redefinition of the area of production), with apparent approval quoted the following conclusion of the presiding officer at such hearings: "The record contains uncontroverted evidence of the discriminatory effects *of the present definition of 'area of production.'*" Here, for the first time, is a clean-cut admission by the Administrator of uncontroverted evidence that *discrimination is created by his definitive regulation in and of itself.*

The authorities cited in the footnote[2] provide the bases for construction of the following specific examples of the discrimination created by the Administrator's definition between establishments within the only geographic area prescribed therein with respect to each of the three cotton handling operations[3].

(1): Example of Discrimination Between Cotton Gins

The town of Slaton, Texas (population 5,036, 1950 Census) is located in Lubbock County which in 1954 produced more cotton than any other county in the United States ("Cotton Production in the United States, Crop of 1954" Bureau of Census). Four cotton gins are located in Slaton.

If the circle of ten airline miles radius prescribed for cotton gins by the Administrator's definition of the area of production is drawn with Slaton, Texas as its center, there are included within that ten mile radius (but more than one airline mile from the corporate limits of Slaton): 2 gins in the village of Wilson (population 265), and one gin each in the villages of Posey (population 25), Southland (population 210), Union (population 15) and McClung (population too small to be recorded by the Census).

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[2]The current issues and records of the authorities cited in "Area of Production: Cotton," December 1944, Wage and Hour and Public Contracts Divisions, Economics Branch, U. S. Department of Labor (Cotton Fire & Marine Underwriters "Classification of Cotton Compresses, Warehouses and Wharves" for the 1955-56 season, Bureau of the Census, Population 1950, and unpublished records of the Bureau of the Census concerning geographical distribution of cotton gins in the cotton-growing states), plus Bureau of the Census "Cotton Production in the United States," Crops of 1949 to 1954 and the Administrator's definition of the area of production (29 C.F.R. 536.2).

[3](Specific examples of such discrimination between cotton compress-warehouse plants are shown more completely in the record in *Traders Compress Company v. Tobin*, No. 441 in the Supreme Court of the United States, October term 1952—R. 145, 147, 243-249, 253-257, 342; and in the record in *Lewis v. Union Compress & Warehouse Company*, No. 39443, in the Supreme Court of Mississippi (1955) (R. 19-20). The example with respect to non-compress cotton warehouses is fully developed (R. 23) in *Lovvorn v. Miller*, No. 14894, in the U. S. Court of Appeals for the 5th Circuit (1954) 215 F. (2d) 601).

(2): Example of Discrimination Between Non-Compress Cotton Warehouses

Athens, Alabama (population 6,309, 1950 Census) is located in Limestone County, which in 1953 produced 65,257 bales of cotton, and in 1954 31,211 bales of cotton. (Although the smallest county in the state, Limestone County during the five years ending with crop-year 1953 produced more cotton than any other county in the state except one adjoining county, and more cotton per square mile of county area than that adjoining county.) Three non-compress public cotton warehouses are located in Athens.

If the circle of 20 airline miles radius prescribed for non-compress cotton warehouses by the Administrator's definition of the area of production is drawn with Athens, Alabama as its center, there are three other public non-compress cotton warehouses located within that 20 airline miles radius, but more than one mile from the corporate limits of Athens, which warehouses are located, respectively, in the villages of Rogersville (population 531), Madison (population 530) and Elkmont (population 179).

(3): Example of Discrimination Between Cotton Compress-Warehouse Plants

Greenwood (population 18,061, 1950 Census) is located in Leflore County, Mississippi. During the five crop years ending with 1953 the State of Mississippi produced one-third more cotton per square mile of state area than any other state in the Union. Greenwood is located in and surrounded by those Mississippi Counties which consistently produce more cotton each year than any other counties in Mississippi. In volume of cotton production LeFlore County consistently ranks fifth among the 82 Mississippi counties

(fourth in volume of cotton produced per square mile of county area during the period 1949-1953). Three public cotton compress-warehouse plants are located in Greenwood.

If the circle of 50 airline miles radius, prescribed for cotton compress-warehouse plants by the Administrator's definition of the area of production, is drawn with Greenwood, Mississippi, as its center, there are also located within that 50-mile radius, but more than one mile from the corporate limits of Greenwood, three other public cotton compress-warehouse plants located in towns of less than 2,500 population, namely: Inverness (population 1,010), Itta Bena (population 1,723), and Ruleville (population 1,521).

Even if all of the cotton received at each of the cotton gins, non-compress cotton warehouses and cotton compress-warehouse plants mentioned in the above illustrations is grown, and received at those establishments from points within the respective circles having radii of 10, 20 and 50 airline miles arbitrarily prescribed by the Administrator's definition of the area of production, the 2,500 population test of the administrator's definition, in and of itself, arbitrarily *excludes* from the defined area of production of cotton the four cotton gins, the three non-compress cotton warehouses, and the three cotton compress-warehouse plants located at the centers of the three respective circles described. But *includes* within the defined area of production of cotton the other six cotton gins, three non-compress cotton warehouses, and three cotton compress-warehouse plants which are also included within those three respective circular areas prescribed by the Administrator's definition[1]. If there is a continuation of the recent trend of population to shift from farms to towns and cities, more

[1]These examples would show the same results if the prescribed circles were drawn about the gin, warehouse and compress-warehouse locations having populations less than 2,500.

and more locations of cotton gins, non-compress cotton warehouses and cotton compress-warehouse plants, with each successive census, will be arbitrarily excluded from the area of production of cotton as defined in the Administrator's regulation, by a factor (population) which has no rational or necessary relation to the fact, or the area, of cotton production.

The authorities previously cited show: (a) that from 10.5% (Tennessee) to 26.9% (Virginia) of all cotton gins in the cotton-growing states are excluded from the defined area of production by the population test alone; (b) that from zero percent (New Mexico) to 100% (Arizona, Florida and Virginia) of all non-compress cotton warehouses in the cotton-growing states are excluded from the defined area of production by the population test alone; and (c) that from 62% (Mississippi) through more than 80% (Arizona and California), through 90% or more (Louisiana, Oklahoma, Tennessee and Texas) to 100% (Alabama, Georgia, New Mexico, North Carolina and South Carolina) of all cotton compress-warehouse plants (again without regard to the distance test on cotton receipts) are arbitrarily excluded from the defined area of production of cotton by the 2,500 population test of the Administrator's definition. Thus it is quite impossible for any cotton farmer in Arizona, Florida or Virginia to store his cotton in a non-compress cotton warehouse within the defined area of production of cotton. Similarily, it is quite impossible for any cotton farmer in either of the states of Alabama, Georgia, New Mexico, North Carolina or South Carolina to have his cotton crop stored or otherwise serviced in a cotton compress-warehouse plant within the administratively defined area of production of cotton.

The latest available data show that more than 99.9% of all cotton on hand in public storage in the United States

as of December 31, 1955 was stored in non-compress cotton warehouses and in cotton compress-warehouse plants located in the cotton-growing states ("Cotton and Linters Consumption, Stocks, Imports and Exports, and Active Cotton Spindles": Dec., 1955; Bureau of the Census, Series M15-1-5-56, Issued January 20, 1956).

Such discrimination between cotton gins, warehouses and compress-warehouse plants, and between plants engaged in handling, packing, storing, pasteurizing, drying, canning, and preparing in their raw or natural state, of other farm and orchard products for market, and in making cheese, butter and other dairy products, —in practical effect is discrimination between the agricultural producers of those products because the producer bears the costs of conducting such operations.

If the 15-mile circle prescribed for operations on fresh fruits and vegetables (by Sec. 1 (ii) of the Administrator's definition) is drawn around fruit-packing facilities in Lodi, San Joaquin County, California, (population 13,798, 1950 Census), there are included within that 15-mile radius (but more than one mile from the corporate limits of Lodi) the fruit-packing facilities in the village of Victor, California (population 400, 1950 Census). Among the various operations named in the Sec. 13(a)(10) exemption, such instances of unlawful discrimination created by the population test of the Administrator's definition can be multiplied by hundreds, and probably thousands.

By arbitrarily withholding application of the exemption from operations conducted in or near places of 2,500 or greater population, the Administrator's definition increases the marketing costs of all farmers who rely (and often must rely) for the essential servicing of their crops upon facilities located in or near places of 2,500 or greater popu-

lation. If given effect, the Administrator's definition will nullify the exemption provided by Congress for such service establishments and for all farmers who patronize (and often must patronize) them.

I-C: The Congress has Disapproved the Administrative Definition of the Area of Production, and Both of the Criteria Employed Therein

Part I-B, pages 32-35 of petitioner's brief is devoted to argument that, by failing to deprive the Administrator of the power to define the area of production of agricultural and horticultural commodities, the Congress in effect, has approved the Administrator's definition. The facts require a contrary conclusion.

Subsequent amendment of the Act, without amending the Section 13(a)(10) exemption or revoking the Administrative definition, cannot by any stretch of the imagination be construed as Congressional approval, tacit or otherwise, of the strained and unnatural construction placed upon that exemption by the Administrator, or of any of the various administrative definitions of the area of production, or of the criteria of population, and distance (of commodity *movement*), employed in the present and earlier definitions.

"Where the law is plain the subsequent re-enactment of a statute does not constitute adoption of its administrative construction." *Biddle v. Commissioner of Internal Revenue* (1938), 303 U. S. 573, 582; *Koshland v. Helvering*, (1936), 298 U. S. 441, 447; *Helvering v. Reynolds* (1941), 313 U. S. 428, 432.

Petitioner overlooks the fact that, during the second session of the 79th Congress (92 Cong. Rec. 3170, April 5,

1946) the Senate adopted S. 1349 which would have made various amendments to the Act. The session ended before that bill has acted upon by the House, and the bill therefore never became law. On April 5, 1946, Senator Wiley of Wisconsin proposed an amendment from the floor, which was adopted by the Senate, and passed by the Senate with the bill, which would have amended Section 13(a)(10) by *transferring from the Administrator to the Secretary of Agriculture* the power and the duty to define the area of production of farm and orchard products. In support of his amendment, Senator Wiley said:

> "It has been suggested by the Administrator that the term 'area of production'—with respect to the various agricultural and horticultural commodities—is impossible to define.
>
> "I submit, Mr. President, that the 'area of production' concept has not been given a fair trial. No effort has been made to formulate definitions which are realistic, which take account of the facts and conditions surrounding the production, processing, and marketing of agricultural and horticultural commodities, and which would give effect either to the letter or the spirit of the provisions of these exemptions as contained in the effective act.
>
> "With the exceptions of dry edible beans and Puerto Rican leaf tobacco, the Administrator has made no effort to issue separate definitions for different commodities, despite the great differences between the actual areas of production of the various commodities.
>
> "The definitions which the Administrator has issued have been strained and unrealistic and clearly designed to restrict the application of the exemption to the fewest possible number of persons engaged in the occupations named in the exemptions. This has been done by restricting the definition to occupations on the farm

on which the commodities are produced, by defining 'area of production' *in terms of the distance which commodities move from the farm to the plant at which they are handled*, in terms of the number of persons engaged in the named operations, *in terms of the population of the towns where the processing establishments are located*. The courts, including the United States Supreme Court, have quite properly held such definitions invalid, because, if given effect, they would frustrate the intention of the Congress in enacting the exemptions.

"The strained, unrealistic, and improper definitions which have been issued probably are, to a considerable extent, the result of ignorance on the part of the Administrator and his staff with respect to the circumstances and conditions of the actual production, harvesting, processing, and marketing of agricultural and horticultural commodities. *It can scarcely be doubted that they are also, in part, the result of the intent of the Administrator to nullify—in so far as possible—the exemptions granted by the Congress.*" (Emphasis added.) (92 Cong. Rec. 3169-70)

The Senate promptly adopted Senator Wiley's amendment. (92 Cong. Rec. 3170).

Petitioner's brief mentions the fact that three years later, when it voted on amendments to the Act (H. R. 5894, substituted for the provisions of H. R. 5856, and passed by the House August 11, 1949), the House of Representatives adopted the identical amendment proposed by Senator Wiley and adopted by the Senate in connection with S. 1349 in 1946. However (except by inference at pp. 148-153 of the separate appendix to his brief), petitioner also overlooks the fact that a corresponding amendment (having identically the same purpose with respect to cotton), and actually defining the area of production of cotton, was adopted by the Senate.

As indicated in the separate appendix to petitioner's brief, pp. 134-153, the identical amendment adopted by the House in H. R. 5894 (and in S. 1349 by the Senate in 1946), transferring the defining authority to the Secretary of Agriculture, had been proposed in the Senate by Senator Stennis. Due to the opposition of (and to) the then Secretary of Agriculture, the amendment was not adopted by the Senate in 1949. (Actually the amendment was never offered on the floor of the Senate). Because of this situation, Senator Eastland of Mississippi proposed an amendment to Section 13(a) of the Act providing that *neither the minimum wage nor the overtime requirements should apply to*

> *"the employees of any employer engaged in the ginning, storing, or compressing of cotton, or in the processing of cotton seed:* PROVIDED, *That such employees are employed in, about, or in connection with such operation or operations conducted in any county in which cotton is produced as shown in the most recent annual cotton production report of the Bureau of the Census."*

That amendment was promptly adopted by the Senate, and passed with the bill by the Senate (Cong. Rec. Aug. 31, 1949, Vol. 95, No. 161 pp. 12804, 12811). The purpose and effect of that amendment (like the Wiley amendment of 1946 and the amendment adopted by the House in 1949) were clearly to rebuke the Administrator for the criteria employed in defining the area of production of farm and orchard products, *and also to provide a Congressional definition of the area of production of cotton.* Therefore, petitioner clearly errs in stating (p. 147, separate appendix to his brief) that "The bill passed by the Senate made no changes in the 'area of production' exemption",—as the managers on the part of the House erred (p. 28, Conference Report on H. R. 5856, Rpt. No. 1453, H. R. 81st Cong. 1st Sess.) in saying that: "The Senate amendment made no

change in existing law." In actual substance, the facts are to the contrary, as indicated on page 29 of that Conference Report. In substance, the purpose, and the effect, of the Senate (Eastland) amendment quoted above (and described on page 29 of the Conference Report) clearly were to extend the area of production exemption of Section 13 (a)(10) to the processing of cotton seed, *and to define the area of production of cotton.*

(The separate appendix to petitioner's brief (pp. 148-153) indicates how Senator Fulbright of Arkansas expressed the disapproval of cotton states Senators of the conference committee action of deleting *both* the House amendment and the Senate amendment, pointing out that they had an identical purpose with respect to cotton.)

Contrary to the argument of petitioner, and contrary to the authorities cited at the bottom of page 35 of his brief, it is nevertheless true that, on every appropriate occasion since original enactment of the Fair Labor Standards Act, each House of Congress has adopted an amendment rebuking the methods and criteria employed by the Administrator in defining the area of production, and depriving him of that power (on one occasion by the Senate with respect to cotton only, and on one occasion by each House of Congress with respect to all farm and orchard products). In the first instance the amendment failed of enactment because Congress adjourned before the bill was considered in the House of Representatives. In two later instances such amendments failed of enactment partly because of the objections of (and to) the then Secretary of Agriculture, and partly because of the dubious exercise of the technicalities of conference committee procedure.

Petitioner gravely errs in arguing (Br. pp. 14, 35) that Sec. 16(c) of the Fair Labor Standards Amendments of

1949 (63 Stat. at 920) "affirmatively approved" his definition. Those 1949 amendments re-enacted Section 13(a)(10) without change. The general continuance by Sec. 16(c) of the then current administrative regulations is qualified by the words: "'. . . *except to the extent that any such . . . regulation (or) interpretation . . . may be inconsistent with the provisions of this act.* . . .". The Administrator's (petitioner's) definition was, and is, inconsistent with the provisions of that Act, and was, and is, therefore, excepted from the "approval" of Sec. 16(c) of the amendatory act.

In all fairness, no one can say that the Congress, or either house thereof, has approved, tacitly or otherwise, the Administrator's (petitioner's) definition, or either of the criteria employed therein. In all fairness, no one can *deny* that on each occasion when it has had an appropriate opportunity to do so, *each house of Congress* has clearly expressed disapproval of the Administrator's (petitioner's) definition, and undertaken to deprive him of any power to define the area of production (either of cotton or) of any agricultural or horticultural commodity.

SENATOR REYNOLDS: "I gathered from the terms of the Amendment that it would actually remove from the provisions of the bill the larger cold-storage plants throughout the country. Of course many of them we find *in the cities of New York, Chicago, St. Louis, San Francisco, and Seattle.*" (Emphasis added)

SENATOR SCHWELLENBACH: "Those are not in the immediate production area."

SENATOR REYNOLDS: "But they would be included."

SENATOR SCHWELLENBACH: "No Senator, they would not be included *because they are not in the immediate production area.*" (81 Cong. Rec. 7877) (Emphasis added.)

SENATOR CONNALLY: "Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants *in apple territory?* There is no limit. The condition is that they are packing plants, and if they are, they are exempt."

SENATOR SCHWELLENBACH: "If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, *within the immediate production area,* it would be exempt." (Emphasis added)

SENATOR CONNALLY: "My understanding is that the largest apple-packing plant in the world is located in Winchester, Va., *right in the heart of a great apple-producing region.* That would be exempt, would it not?" (Emphasis added)

SENATOR SCHWELLENBACH: "*If the work done in that plant is as described in the amendment, it would be exempt.*" (NOTE: Winchester, Va. 1930 Census had a population in excess of 10,800). (Emphasis added)

SENATOR SCHWELLENBACH: "The purpose of the amendment is not for the protection of the packing plant or for the protection of the owners of the packing plant. *The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill.*" (Emphasis added) (81 Cong. Rec. 7877)

The Section 13(a)(10) exemption, as enacted, was extended far beyond Senator Schwellenbach's original intention to confine the exemption to fresh fruits and vegetables and to "agricultural operations." The Schwellenbach amendment was very substantially amplified, especially by the amendments of Senator Borah and of Representative Biermann.

Senator Borah's amendment, which was offered at 81 Cong. Rec. 7877 and adopted at 81 Cong. Rec. 7947, exempted from the overtime requirement the receiving, processing and manufacturing of milk, cream and butter by farmer cooperatives "*in dairy production areas.*" In the exemption as finally enacted, reference to farmer cooperatives was deleted, and the exemption was applied to both the minimum wage and the overtime requirements, and to the making of "cheese or butter or other dairy products" within the area of production.

In the final form in which enacted, Section 13(a)(10) was substantially a combination of the Biermann amendment (adopted on the House floor) and the Borah amendment (adopted on the Senate floor), separated from the definition of "agriculture" and set up as a separate and distinct exemption. The Biermann amendment was proposed at 83 Cong. Rec. 7325 and adopted by the House at 83 Cong. Rec. 7408.

The exact provisions of the Biermann and Borah amendments are as follows:

The Biermann amendment:

> "Strike out subsection (g) of Section 3 (the Schwellenbach amendment as approved by the House Labor Committee) and insert in lieu thereof: (g) 'employees engaged in agriculture' includes individuals employed within the area of production engaged in the handling, packing, storing, ginning, compressing, processing, pasteurizing, drying, or otherwise preparing agricultural commodities for market."

The Borah amendment:

> "And provided further that the provisions of this paragraph (c) shall not apply to employees employed in a plant *located in dairy-producing areas*, in which

milk, cream or butter fat are received, processed, shipped, or manufactured if operated by a cooperative association as defined in the Farm Credit Act of 1933—."

In discussing his amendment Mr. Biermann, among other things, said:

> "The important thing is that the farmer pays the bill for this processing . . . When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increases, the farmer gets just so much less; and our contention . . . is that *this bill, designed to help labor, should not be so worded that it puts another burden on the agriculture of this country.*" (83 Cong. Rec. 7401). (Emphasis added)

The above, and similar statements made by the authors in the course of debates on this exemption, demonstrate the conviction of the authors of the exemption (a), that the farmers pay (or bear in the form of reduced prices for their crops) the costs of performing the operations named in Section 13(a)(10); (b), that the farmers would bear any increase in such costs resulting from application of the minimum wage and overtime requirements of the act to such operations; and, (c) that this is especially true when such operations are performed within a geographic area characterized by agricultural production of the commodity or commodities involved.

The clear language of Section 13(a)(10), and its legislative history, demonstrate the purpose of Congress to exempt the operations named therein whenever those operations are performed within an area characterized by the growing of the commodity or commodities involved and thus, at least to that extent, prevent the wage and overtime requirements of the Act from increasing the costs borne by farmers and horticulturists incident to the marketing of their crops.

In its decision in *Addison et al., v. Holly Hill Fruit Products, Inc.* (322 U. S. 607 at p. 615) the Supreme Court quoted a remark of Representative Biermann on the House floor concerning labor differentials between large cities and small towns. Mr. Biermann's remark obviously related to the abortive consideration of minimum wage legislation during the preceding session of Congress in which extensive consideration had been given (in the fixing of a minimum wage) to the establishment of regional wage differentials. In any event the Court correctly concluded in footnote 8): "Certainly Mr. Biermann did not give the remotest intimation that the 'area of production' was meant to convey any idea other than that which area usually conveys."

What Mr. Biermann meant by use of the term "large city" was made clear on the same page of the Congressional Record:

> "I do not find fault with the Committee on Labor, but I think whereas they are the experts who have knowledge regarding the big factories in Jersey City, New York City and some of the other *large cities*, by the same token we who come from the farm areas are best qualified to say what terms should apply to labor in those areas." (83 Cong. Rec. 7401)

As noted above herein, Senator Schwellenbach also indicated that, while the cold storage of fruits and vegetables in New York City, Chicago, St. Louis, San Francisco and Seattle would not be subject to his exemption, the reason for exclusion from the exemption was not the size of those cities but the fact that they were not within the area of production. (81 Cong. Rec. 7877). He categorically stated that the packing of apples in Winchester, Va., in the center of "a great apple-producing region" would be exempt

(because Winchester is in the area of production, and regardless of the fact that the population of Winchester was more than 10,000) (81 Cong. Rec. 7877).

II: Sections 13(a)(6) and 13(a)(10) Express the Intention of Congress to Protect the Farmer Against the Impact (direct or indirect) of the Minimum Wage and Overtime Requirements

The fundamental error of petitioner's position with respect to the Section 13(a)(6) and Section 13(a)(10) exemptions is that he refuses to recognize that those exemptions establish a clear Congressional policy,—separate and distinct from—and (within the scope of those exemptions) diametrically opposed to—the general policy of the Act,—namely, to exclude from the scope of the Act's requirements both (a) every practice performed by a farmer *or* on a farm in connection with farming operations, and (b) all of the operations named in Section 13(a)(10) (necessary to the marketing of farm and orchard products) when performed (by anyone) within an area characterized by agricultural production of the commodity or commodities involved. That policy of exclusion from the Act's requirements is the *controlling* Congressional policy in construing and applying those exemptions.

If a given employment or operation (as here) is within the letter and the spirit of either exemption, the Congressional policy of exclusion applies,—not the general policy of the Act. In such circumstances the exemption, or exclusion, of itself, is "remedial" in nature and should be liberally construed. See *McComb v. Hunt Foods, Inc.* (C. A.—9, 1948) 167 F. (2d) 905, 908; Cert. Den. 335 U. S. 845.

Even Senator Pepper, floor manager for the 1949 amendments, and one of the group of Senators seeking repeal or

restriction of these exemptions, stated just prior to the adoption of the conference report which reenacted Section 13(a)(10) intact: —

> "I think it is the consensus of opinion of the conferees that they hope the Wage and Hour Administrator will constantly endeavor to improve the definition of 'area of production', and, especially in the case of cotton, that he will apply it as liberally as possible." (95 Cong. Rec., Oct. 18, 1949, No. 195, pp. 15201-2)

Neither bill, as it originally passed either the House or Senate, conferred any authority upon the Administrator to define the area of production of any farm or orchard product. That authority in its present form was inserted in the Act by the conference committee, apparently as an afterthought, without discussion or explanation, and was adopted with the conference report by each house of Congress, without discussion or explanation.

The Congressional debates in both houses of Congress, preceding enactment of the Fair Labor Standards Act in 1938, produced many expressions of solicitude for the economic plight and welfare of the farmer, and of determination to protect all farmers and horticulturists, so far as feasible, from any increase in the costs of producing or marketing their crops (and from any decrease in the prices received for their crops) caused by the application of the minimum wage or overtime requirements of the Act.

Senator Schwellenbach of Washington was the author of the Senate floor amendment exempting the packing, storing, and preparing of fresh fruits and vegetables (81 Cong. Rec. 7876) which was adopted in the Senate (81 Cong. Rec. 7949).

Most of the Senate debates related to off-the-farm serv-

ing of apples in particular, and fresh fruits and vegetables in general. Senator Schwellenbach's amendment related only to fresh fruits and vegetables. His thinking and discussions revolved around apples. He was especially concerned with an exemption which would equalize the small farmer (who has to rely for the services essential to marketing upon the purchasers, or upon bail or-for-hire) with farmers conducting operations large enough to enable them to perform their own storing, preparation, packing, etc. for market on or off the farm (81 Cong. Rec. July 30, 1937, pps. 7876-7878). He indicated clearly that "the area of production" was intended to mean simply any geographic area characterized by production of the product or products involved.

SENATOR CONNALLY: "The effect of the amendment is to exempt all employees of apple-packing plants; is it not?"

SENATOR SCHWELLENBACH: "If they are engaged in the area of production and so long as the apples are in natural or raw state; yes, sir." (81 Cong. 7876)

The recent and current condition of American agriculture certainly continues to justify the Congressional solicitude manifested in Sections 13(a)(6) and 13(a)(10) of the Act. All segments of our national economy are booming, except agriculture. Every indicator of the economic welfare of agriculture (with the single exception of land values) has fallen substantially, and the trend is still downward. For 1954, realized net income from farming had fallen 21.2% since 1946, whereas national disposable personal income had increased by 60% (see Appendix A hereto). While the average size of American farms is increasing, the average cotton farm (like most other farms) is still

quite small and continues to justify the Congressional purpose of Section 13(a)(10) to keep small farmers equalized under the Act with the operators of farms sufficiently large to justify the storing, packing, preparation for market, Etc. by the farmer. For example: in 1953, 20.5% of all cotton farms were less than five acres; 54.7% were less than 15 acres; and 73.9% were less than 30 acres. (U. S. D. A., Commodity Stabilization Service, Cotton Division, unpublished statistics.)

III: The Piling and Re-Piling of Tobacco Is Not Manufacturing or Industrial Processing. It Leaves the Tobacco in its "Raw or Natural State" Within the Meaning of Sec. 13(a)(10).

It is conceded that the tobacco is in its raw or natural state when delivered to respondents' packing houses. As the tobacco leaves respondents' packing houses it is not cooked, "finished" or manufactured, nor has it undergone any mechanical or artificial processing. The only mechanical or artificial factor involved is air conditioning, that is, the regulation of temperature and humidity within the packing house. Such regulation of temperature and humidity is a beneficial and often necessary incident to the mere storage and safekeeping of many farm and orchard products (e. g., fruits and vegetables), sometimes for the purpose of retarding, and sometimes for the purpose of encouraging natural ripening or drying. It is a normal incident of "hot house" farming. Surely the gradual drying, fermentation, and other natural phenomena, which occur during and between the piling and re-piling of leaf tobacco no more transmute such tobacco from its raw state than does the ripening of fruits or vegetables in storage when controlled by the regulation of temperature and humidity.

All of the changes which take place in such tobacco in the packing house are continuation of natural phenomena which begin, and occur in varying degrees, in the tobacco barns on the farm (RK 7-10). Clearly the piling and re-piling do not in any way alter the nature of such natural changes. The purpose and the effect are to provide conditions conducive to the uninterrupted continuation of, and which in some degree hasten these natural processes (the result of placing a relatively large quantity in one pile); and to permit their more uniform development in all tobacco throughout the pile (which results from remaking the piles from time to time, moving tobacco from the inside to the outside and from the outside to the inside of the pile). These operations simply interpose some degree of encouragement and control of these natural developments. The nature and result of such developments appear to be analogous to the controlled ripening of tomatoes, avacados, pears, apples or bananas in storage. In each instance, it is natural for internal chemical and physical changes to take place which, when properly controlled as to extent and uniformity, make the product suitable, or more suitable, for its intended human consumption or use. Neither procedure involves manufacture, mutilation, or the use of artificial catalysts (RK 7-10, 35, 49-53). Surely the resulting product in either case is an agricultural product in its "natural state."

It clearly appears that all of the operations performed by employees in respondents' packing houses consist of the physical "handling" of the tobacco. The "storing" and physical safe-keeping of the tobacco, while not the primary purpose of all packing house operations, is an inevitable and necessary concomitant of all such operations. "Drying" is involved. "Packing" is an essential part of such operations. Thus such operations in the aggregate include four of the operations specifically named in the exemption ("han-

dling," "packing," "storing," and "drying") none of which is qualified by the phrase "in their raw or natural state."

"Preparing" (for market) is the only term in Sec. 13(a)(10) which is qualified by the words "in their raw or natural state." It does not appear that any of respondents' employees is engaged in any activity not encompassed by the terms "handling", "packing", "storing" and "drying". However, if there were any such activity, it would fall inevitably within the residual or catch-all term "preparing in their raw or natural state."

The tobacco is ultimately sold and shipped unstemmed. (RB 141-142; RK 49, 50, 68). There is no mechanical processing operation involved such, for example, as the grinding of sugar cane and the reduction of the resulting juice to sugar or molasses. In *Puerto Rico Tobacco Marketing Co-operative Association v. McComb*, 181 F. (2d) 697 (C. A. —1, 1950), Administrator (appellee) McComb conceded, and both trial and appellate courts found that tobacco continues in its raw or natural state until the stems are removed from the leaves after piling ("bulking").

Prior to December 25, 1946, and in his new definition promulgated on that date, until January 1, 1949, the Administrator's definition of the area of production of Puerto Rican leaf tobacco described the exempt operations under Section 13(a)(10) of the Act as including the "piling, bulking, or otherwise handling unstripped (unstemmed) tobacco for market . . ." (29 C. F. R. 536.2(c) prior to December 25, 1946; and 29 C. F. R. 536.2(a)(2) from December 25, 1946 through December 31, 1948). In an amendment of November 18, 1948 (13 F. R. 7347) effective January 1, 1949, the Administrator deleted from his regulation all references to Puerto Rican Leaf tobacco, announc-

ing of leaf tobacco . . . will not provide a basis for exempting that his purpose was "to make it clear" that the "bulking" under Section 13(a)(10).

There is no indication that the Congress even knew of the Administrator's reversal of his long-standing interpretation, or his re-construction of Sec. 13(a)(10) as *not* applying to the bulking of tobacco. That re-construction was and is inconsistent with Section 13(a)(10) as originally enacted, and as re-enacted in 1949, and was therefore excepted from the general continuation of administrative regulations and interpretations by Section 16(c) of the 1949 amendatory Act, which is qualified by the words: ". . . except to the extent that any such . . . regulation, (or) interpretation . . . may be inconsistent with the provisions of this Act . . .". Petitioner errs indeed in arguing (Br. 17-18) that Section 16(c) "ratified" his reversal of the reasonable and logical construction applied for more than ten years.

IV-A. The Section 13(a)(6) Exemption of Agricultural Employment Applies to the Operations of Respondents May and King Edward

Section 13(a)(6) of the Act grants a complete exemption from the minimum wage and overtime requirements to "any employee employed in agriculture"; and Section 3(f) *specifies* what is included within the term "agriculture":

> "As used in this Act 'agriculture' includes . . . *any* practices . . . performed by *a* farmer . . . as an incident to *or* in conjunction with . . . farming operations, including preparation for market (and) delivery . . . to market . . ." (Emphasis added)

In common usage, and according to Webster's International Dictionary, the words "any practices . . . performed

by a farmer" clearly mean *each* practice performed by *any* farmer. Otherwise these familiar English words have lost their meaning. When a specific provision of a statute is clear, and consistent in context, there is no need for recourse to the sometimes dubious "light" of legislative history. This provision expresses (unaided) a clear and consistent purpose to exempt *any* farmer in the performance of *any* practice, so long as that practice is performed *either* "as an incident to", "*or*", "in conjunction with" any of the previously detailed "farming operations." By reference to Section 15(g) of the Agricultural Marketing Act (12 USC 1141j(g)) the definition of agriculture is extended to include the production of gum spirits of turpentine, and gum rosin "as processed by the original producer of the crude gum (oleoresin) from which derived."

Petitioner relies (Br. p. 51) on the following quotation from *Maneja v. Waialua Agricultural Company*, 349 U. S. 254, 260:

> "Nevertheless, no matter how broad the exemption, it was meant to apply only to agriculture and we are left with the problem of what is and what is not properly included within that term."

From the remainder of the Court's opinion in *Waialua*, it is plain that this Court did not mean that the statutory definition of "agriculture" in Section 3(f) of the Act could be ignored in determining what constitutes "agriculture." The quoted sentence merely indicates that the Court was "left with the problem" of ascertaining the meaning of the words employed in the statutory definition. For the reasons which follow, we think it clear that all of the operations here involved fall within both the letter and the spirit of that statutory definition, and of the exemption provided in Section 13(a)(6). If the Court were to reach a contrary conclu-

sion, then, not only May and King Edward, in their packing house operations on Type 62 tobacco at Quincy, Florida, but all American agriculture would be substantially deprived of the exemption now granted in the Act to farmers in their off-the-farm storing, servicing and processing of their crops for market.

Whether an individual proprietorship, a partnership or a corporation, practically every farm enterprise in the United States, whether large or small, and whether it produces livestock, milk, grain, forage crops, seed, cotton, fruits, vegetables, tobacco or any other agricultural or horticultural commodity, engages in one or more of the activities conducted by respondents in their packing houses. The operations of all farmers include the "handling" of the products of the farm. A great many farmers and horticulturists "pack" their farm products for market, and "store" their farm products for market. Many "dry" such products as apples, grapes, peaches, apricots, etc., for market. Both on and off the farm, many farmers conduct operations much more in the nature of "industrial processing" than the curing and piling of leaf tobacco. For example, many farmers can their own fruits and vegetables, slaughter and dress their own poultry and hogs, process their own apples into cider, pomace and apple butter, convert maple sap into maple syrup and maple sugar, mechanically clean their own apples, Etc.

It is perfectly plain then that the statutory definition of agriculture, when it refers to "farming in all its branches" and to "any practices . . . performed by a farmer . . . as an incident to or in conjunction with such farming operations, including preparation for market, delivery . . . to market"; Etc., includes all of the activities mentioned above, and all of the activities performed by respondents' employees in their packing houses on the product of their farming operations.

The legislative history will be searched in vain for any hint that Congress intended by the agricultural exemption to exempt only small farms, or small farmers, or to restrict the exemption of off-the-farm operations to those performed by *all* farmers or to those performed by farmers generally. Qualification of the performance of farmer practices by the word "ordinarily" was once proposed (81 Cong. Rec. 7657), but was rejected. The ginning of their own cotton, though not a practice generally performed by farmers, is unquestionably exempt when performed by farmers either on or off the farm (81 Cong. Rec. 7656, 7659, 7660, 7657; *Maneja v. Waialua Agricultural Co.*, 349 U. S. 254, 268).

In the very nature of things, such farmer practices as those of respondents herein, and the ginning of cotton, the washing and cleaning of apples, Etc., can be and are performed only by farmers producing a sufficient volume to justify the expense of the facilities and equipment with which to perform such operations. To the extent that the farmers' volumes of production can and do justify such practices by the farmer, they are practices "ordinarily" performed by such a farmer. To the extent that farmers' volumes of production are not sufficiently large to justify or permit such practices by the farmers, such operations are not performed by the farmers at all, and such smaller farmers are compelled to rely for such services and processing upon bailees-for-hire or the purchasers of their products (one of the underlying reasons for enactment of the Section 13(a)(10) exemption).

The legislative purpose of the agricultural exemption was to spare the farmer from additional costs. Furthermore, Congress recognized that farm operations, and the servicing and processing of farm products, unlike industrial operations, cannot be regulated by the clock. The coming and

going of the seasons do not await the pleasure of man. Sunshine, rain, humidity and warmth are not yet subject to man's control. The time to plant and the time to harvest are determined by the vagaries of nature. Calves, lambs, and pigs are born at all hours of the day and night. Livestock must be fed and cows must be milked each day, including Saturdays, Sundays and holidays. Plant and animal growth (like the curing and ripening of tobacco in packing houses) continues around the clock. Successful farming and farmer-processing or servicing demand long hours of labor on certain days, and few hours of labor on others. Frost, heat, humidity, rainfall, relative day and night temperature, presence or absence of pests, and the incidence of disease are the practical factors governing these demands. In an efficient farming or farmer-processing or servicing operation, no limitation or regulation of the farmer's hours is possible.

Senator McAdoo proposed an amendment to the definition of agriculture which would have exempted "any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits."[5]

In support of his proposed amendment, Senator McAdoo described the situation in these words:

> "These agricultural commodities are highly perishable; and the work which must be done by the packing houses, and on the farm varies greatly with temperature variations. Twenty four hours in advance, one cannot know whether the crop must be moved. So, to

[5]When it was pointed out that an earlier amendment already adopted by the Senate covered the situation about which he was concerned, Senator McAdoo withdrew his amendment. (81 Cong. Rec. 7927-7929)

fix rigid hours of labor in such cases would be to ruin the producers, as the crop must be handled quickly with the workers available. The broadening of the definition as I have suggested is not only directly in line with the object of the bill, but will also protect the farmers, who, in my State at least, are engaged in a method of marketing, packing and handling their crops which may differ from the methods employed in other States." (81 Cong. Rec. 7927).

Whether or not a farming operation, or a farmer-processing or servicing operation, is large or small, mechanized or not, the farmer must perform the farming and the work of farmer-processing or servicing when he can, depending upon the factors and conditions of nature. For this reason, among others, Congress granted a complete exemption to all agriculture, and to every practice of every farmer performed as an incident to or in conjunction with his farming operations, regardless of all other factors. Petitioner herein has ignored that Congressional purpose.

IV-B: Farmers Have Relied, and Are Entitled to Rely, Upon the Interpretations of the Department of Labor in Regarding as Exempt Their Various Farm Activities and Farmer-Processing and Servicing Activities.

Concurrently with issuance by the Administrator of Interpretative Bulletin No. 14, the Administrator issued a press release indicating that such administrative interpretation of the agricultural exemption was made only after lengthy conferences with representatives of employers, employees and other interested parties, and consultation with authorities in the U. S. Department of Agriculture. The release indicated that Labor Department attorneys had given intensive study to the legislative history of Section 13(a)

16), and that the Department had considered economic studies made by its economists to assist it in properly ascertaining the scope of the exemption. It was only after such lengthy and intensive investigations and discussions that the Administrator issued official opinions on the subject. Those opinions were widely circulated through Interpretative Bulletin No. 14, press releases, Etc.

When those official interpretations were announced, the farmers of the Nation relied upon them, and were guided by them in considering the compensation and working conditions of their employees. Those interpretations (as set forth in the brief of respondents King Edward and Budd herein) were never modified. Since they are in harmony with both the language and the spirit of the exemptive provisions, they deserve the respect which this Court has said is due such administrative interpretations. *United States v. American Trucking Associations, Inc., et al.*, 310 U. S. 534, 549. This Court has also said that employers, as well as courts, may properly resort to such interpretations for guidance. *Skidmore v. Swift*, 323 U. S. 134, 140. The right of employers to rely, and the immunity of employers based on reliance, on such interpretations by the Administrator or petitioner has been confirmed by Congress in the Portal to Portal Act of 1947, 61 Stat. 88, 89; 29 U. S. C. 258, 259.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

The Relative Condition of American Agriculture

Secretary of Agriculture Benson, speaking January 16, 1956 to the National Council of Farmer Cooperatives in Los Angeles (USDA release 137-56, sheet 5) stated that "about 1.3 million farm families in this Nation have incomes of less than $1,000." Secretary Benson's statement dramatizes the general farm situation as reflected by the following facts:

Production expenses of U. S. farm operators for 1953 had increased 50% from 1946 and 259.4% from 1939 (USDA "Agricultural Statistics" 1954, p. 487, Table 671).

In total dollars the realized net income of farm operations for 1953 had fallen 9.8% since 1946; and net income of persons on farms 9.3%. During the same period national disposable personal income increased by 57.1% (USDA "Agricultural Statistics" 1954, p. 429, Table 604).

In 1954 the realized net income from farming dropped further to 21.2% under 1946 (USDA Agricultural Marketing Service "Farm Income Situation", October 1955, Table 1). By way of contrast, national disposable personal income for 1954 had risen 60% from 1946 (U. S. Department of Commerce, Office of Business Economics, "Survey of Current Business", July 1955, pp. 10-11).

A reduction in farm population is the obvious cause for a slight increase in average net income *per capita* for the farm worker and for the farm population from agriculture. Nevertheless, a similar, though less extensive, disparity persists between the income of the farm worker and the factory worker, and between the farm population and the non-farm population. The average net income per capita of the farm population from agriculture for 1954 was up

3.5% from 1946, whereas the average net income per capita for the non-farm population from non-farm sources was up 42.8% from 1946. Similarly the annual income per farm worker in 1954 was up 3.4% from 1946; whereas the annual income per factory worker in 1954 was up 64% from 1946. (USDA Agricultural Marketing Service "Farm Income Situation", October 1955, Tables 7 and 8.)

Farm mortgage debt has increased more than 70% since 1946. (USDA Agricultural Research Service, Neg. 55(6) 170).

Compared with the averages for calendar 1950, prices paid by farmers in December 1955 were up 9%; whereas prices received by farmers were down 13.6% (Statistical Abstract of the U. S., Bureau of the Census, 1955, p. 643, Table 781; "Agricultural Situation" USDA Agricultural Marketing Service, January 1956, Vol. 40, No. 1, p. 24.)

The farmer's share of the retail price of food in November, 1955 was 39%, a decline of 25% from the average of 1946). (USDA "Agricultural Statistics" 1954) p. 466, Table 655; USDA Agricultural Marketing Service "Agricultural Situation" January 1956, Vol. 40, No. 1, p. 24.)

Farmers' costs of marketing food crops in 1955 were up 4% from 1954 and up 21% from the average of 1947-49, whereas farmers' receipts for food crops were 3% down from 1954 and 16% down from the average of 1947-49.

This does not mean that food marketing agencies are reaping additional profits. It indicates increases in food marketing costs. For example, the hourly earning rates of wages and salaries in food marketing for 1954 were 51% above the average for 1947-49; though by increased productivity, total labor costs were held at 39% above the average for 1947-49. Wages in food marketing for September

1955 were 44% above the average for 1947-49. Current rail freight rates on major agricultural commodities are 24% above the average for 1947-49.

Actually food processors' profits after income taxes amounted to 1.8% of sales for 1954; down 21.7% from 1947-49. Food wholesalers' profits after income taxes for 1954 were 1.0% of sales; down 41.2% from 1947-49. Chain retail food store profits after income taxes for 1954 were 1.0% of sales; down 28.6% from 1947-49.

(Authority for all of the above: USDA Agricultural Marketing Service, "Agricultural Situation". December, 1955, Vol. 39, No. 12, p. 9).

APPENDIX B

Pertinent Provisions of the Fair Labor Standards Act of 1938, As Amended

Sec. 3. As used in this Act—

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Sec. 13(a) The provisions of sections 6 and 7 shall not apply with respect to

(6) Any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or

(10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or

APPENDIX C

Full Text of Administrator's Current Definition of the Area of Production; 29 C. F. R. 536.2, Federal Register December 25, 1946:

"Area of Production" as used in section 13(a)(10) of the Fair Labor Standards Act.

(a) An individual shall be regarded as employed in the "area of production" within the meaning of Section 13(a)(10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95% of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:

(i) with respect to the ginning of cotton—10 miles;

(ii) with respect to operations on fresh fruits and vegetables—15 miles;

(iii) with respect to the storing of cotton and any operations on commodities not otherwise specified in this sub-section—20 miles;

(iv) with respect to the compressing and compress-warehousing of cotton, and operations on tobacco, grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this regulation:

(1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within

one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or

five air line miles of any city with a population of 500,000 or greater, according to the latest available United States census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95% of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.